***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 74-1353

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

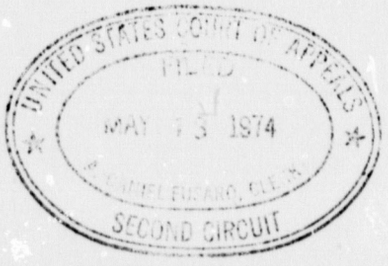
FRANK J. McKIBBON and
ROBERT L. DiGREGORIO,

Appellants.

Docket No. 74-1353

JOINT APPENDIX TO APPELLANTS' BRIEFS

ON APPEAL FROM JUDGMENTS
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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PAGINATION AS IN ORIGINAL COPY

100

DOCKET

MISHLER, J.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| THE UNITED STATES | For U.S.: Rich Shanley |
| vs. | |
| FRANK J. McKIBBIN<br>ROBERT L. DI GREGORIO | |
| | For Defendant: MC KIBBIN:<br>Leon Port<br>123 Hicks St , Bklyn<br>858-3930 |
| Extortion | |

| ABSTRACT OF COSTS | AMOUNT | | CASH RECEIVED AND DISBURSED | | | |
|---|---|---|---|---|---|---|
| | | | DATE | NAME | RECEIVED | DISBURS |
| *Fine,* | | | 2-21-74 | Notice of Appeal filed 2-21-74 | 5 — | |
| *Clerk,* | | | 2-21-74 | Paid in full | {Mailed — | |
| *Marshal,* | | | 3/15/74 | Notice of Appeal (McKibbin) | | |
| *Attorney,* | | | | No Fee) | | |
| *Commissioner's Court,* | | | | | | |
| *Witnesses,* | | | | | | |

| DATE | PROCEEDINGS |
|---|---|
| /23/73 | Before NEAHER, J.- Indictment filed and ordered sealed by the Court - Bench Warrants ordered as to all defts. |
| 5/25/73 | Bench Warrants issued. |
| 5-29-73 | Before MISHLER, CH J - Case called - Indictment unsealed by the Court - deft MC KIBBIN & counsel Leon Port present - deft arraigned and enters a plea of not guilty - Sept. 4, 1973 for Trial - Bail set at $5,000 personal bond - June 15, 1973 for all motions - Bench Warrant vacated. Bench Warrant retd and filed executed. (McKibbin) |
| 6-30-73 | Bench Warrant retd and filed - Executed as to deft DI GREGORIO. |
| 6-30-73 | Before MISHLER, CH J - Case called - Deft DI GREGORIO & counsel E.Kelly of Legal Aid present - Court appointed Legal Aid as counsel for the deft. Deft DI GREGORIO arraigned and enters a plea of not guilty - bail set at $5,000 personal bond - set for Trial 9- |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA

-vs-

FRANK J. MC KIBBIN
ROBERT L. DI GREGORIO,

Defendants

----------X



INDICTMENT

18 U.S.C. §894, 2

73 CR 528

THE GRAND JURY CHARGES:

COUNT ONE

That on or about and between May 1, 1972 and August 9, 1972, both dates being approximate and inclusive within the Eastern District of New York, the defendant FRANK J. MC KIBBIN and the defendant ROBERT L. DI GREGORIO, knowingly used extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to attempt to collect and to collect from Aram Carapetyn, a debtor, an extension of credit, to wit; the defendant FRANK J. MC KIBBIN and the defendant ROBERT L. DI GREGORIO expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person of the said debtor.

(Title 18, United States Code, Section 894, 2)

COUNT TWO

That on or about and between May 1, 1972 and November 1, 1972, both dates being approximate and inclusive within the Eastern District of New York, the defendant FRANK J. MC KIBBIN, knowingly used extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to attempt to collect and to collect from Carl Gross, a debtor, an extension of credit, to wit; the defendant FRANK J. MC KIBBIN expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person of the said debtor.

(Title 18, United States Code, Section 894)

A TRUE BILL

Elliot Skelos

FOREMAN

Robert A. Morse

Robert A. Morse

73 CR 328

| DATE | PROCEEDINGS |
|---|---|
| | Bench Warrant vacated as to deft DI GREGORIO. |
| 7/26/73 | Magistrate's file 73 M 795 inserted into CR file. |
| 9/4/73 | Before MISHLER, CH.J.- Case called- Defts and counsel present- Case reset for trial on Nov. 5, 1973 on consent of both sides |
| 9/18/73 | Notice of motion filed that a court appointed psychiatrist examine both defts to determine their mental stability ret. 9/21/73 |
| 9-21-73 | Before Mishler Ch J - Case called - Motion argued (for court appointed psychiatrist to examine both defts.) - Decision Reserved - all briefs by Oct. 15, 1973. |
| 10/12/73 | Memorandum of Law filed |
| 10-17-73 | By MISHLER, CH J - Memorandum of decision and order filed denying motion of deft McKibben for a psychiatric examination. |
| 10-18-73 | Magistrate's file 73 M 794 inserted into CR file. |
| 11-5-73 | Before MISHLER, CH J - case called - defts & counsels present - Nov.12, 1973 for trial |
| 11-5-73 | Govts Trial Brief filed. |
| 11-12-73 | Before MISHLER, CH J - Case called - defts McKibbon and Di Gregorio present with counsels - Motion by deft DE GREGORIO to sever from the trial is denied - Trial ordered and BEGUN -Jurors selected and sworn - Trial contd to Nov. 13, 1973. |
| 11-13-73 | Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial res Hearing held as to statements made by deft Di Gregorio- Hearing concluc Trial resumed- Trial contd to 11-14-73 |
| 11-14-73 | Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial re Motion by the defts for a judgment of acquittal denied- Trial contd to |
| 11-15-73 | Before MISHLER, CH J - Case called - defts & attys present - Trial resumed - both sides rest - defts renew their motion for judgment of acquittal - motion denied - at 2:15 PM the Jury retired for deliberatior At 5:40 PM the Jury returned and rendered a verdict of guilty as to deft MCKIBBIN on count 1 and not guilty on count 2; guilty verdict on count 1 as to deft GREGORIO - Jury polled - jury discharged - Trial concluded - motions reserved until time of sentence - sentencing adjd without date - bail conditions continued. |
| 11-15-73 | By MISHLER, CH J - Order of sustenance filed -lunch 15 persons. |
| 12-5-73 | Notice of Motion filed for a new trial under Federal Rules of Criminal Procedure 33, on the grounds of newly discovered evidence, etc.(Chief Judge has papers) |
| 12-11-73 | Letter of Dec. 5, 1973 from Legal Aid received from Chambers, filed. (re granting of new trial on the grounds of newly discovered evidence,et |

CRIMINAL DOCKET 73 CR 523

| DATE | PROCEEDINGS |
|---|---|
| 1/2/74 | Stenographer's transcripts of 11/12/73 and 11/13/73 filed. |
| 1/7/74 | Voucher for Compensation filed |
| 1-7-74 | By MISHLER, CH.J.- Memorandum of Decision filed that the court wi hold an evidentiary hearing on defts' motion for a new trial on 1 at 2:00 P.M.- Defts are directed to obtain the appearance of Jack Only the testimony of Jack Levine will be taken |
| 1-18-74 | Before MISHLER, CH J - case called - defts McKIBBEN & DiGREGORIO present with counsels - hearing held on newly discovered evidence - hearing concluded - decision reserved. |
| ~~1-29-74~~ | ~~Stenographer's transcript filed dated January 21, 1974~~ |
| 2-6-74 | 4 volumes of stenographers transcripts filed(one dated Nov. 12, 1973 at 10:00 am and one dated Nov. 13, 1973 Nov. 14 and Nov. 15, 1973, respectively. |
| 2-6-74 | By MISHLER, CH J - Memorandum of Decision and Order filed denying defts motion for a new trial, etc. |
| 2-25-74 | Notice of appeal from order of 2-6-74 denying deft's motion for new trial filed (MC KIBBIN) |
| 2-25-74 | Docket entries and duplicate of notice of appeal mailed to Court Appeals (MC KIBBIN) |
| 3-15-74 | Before MISHLER, CH J - case called - defts & counsels present - Deft MC KIBBEN sentenced to imprisonment for a period of 2 yrs on count 1 pursuant to 18:3651 - deft to serve one month in a jail type institution and the balance of sentence is suspended and deft is placed on probation for 23 months.Clerk to file Notice of Appeal without fee on behalf of the deft. Execution of sentence stayed pending appeal. Imposition of sentence is suspended as to deft DI GREGORIO and the deft is placed on probation for one year. Execution of sentence is stayed pending appeal. Clerk to file Notice of Appeal without fee on behalf of the deft. |
| 3-15-74 | Judgment & Commitment and Order of Probation filed for deft. MC KIBBEN. Certified copies to Marshal and Probation. Judgment and Order of Probation filed for deft DI GREGORIO. Certified copies to Probation. |
| 3-15-74 | Notice of Appeal filed without fee as to both defts. |
| 3-15-74 | Docket entries and duplicate of Notice mailed to C of A with Form A for both defts. |
| 3-27-74 | Orders received from Court of Appeals and filed that records be docketed on or before 4-4-74 (BOTH DEFTS) |

D. C. 109

1:15 p.m.

(The jury enters the jury box.)

THE COURT: Mr. Foreman and Ladies and Gentlemen of the Jury: We have reached that point in the trial where it becomes my duty to charge you on the applicable law. The lawyers have completed their work. They fulfilled their obligations to their clients and now it becomes the obligation and the duty of the jury to perform its function as I am now performing mine in charging you on the law.

Of course, the lawyers are protagonists. They are involved with their clients' cause and, of course, they are partisan. The Court, on the other hand, is objective, impartial, dispassionate, and so is the jury. As between the Court and the jury, there is a distinct line of demarcation in authority. You and you alone are the sole judges of the facts. That means you and you alone must decide from the record, the evidence in the case, what happened, and then, having found out what happened or determined what happened, apply the law as the Court charges it in arriving at the ultimate decision as to the guilt or innocence of Frank McKibbin in Counts 1 and 2 of the indictment, and against Robert L. DiGregorio on

Count 1 of the indictment.

I respect your authority and I leave it wholly within your power and jurisdiction to decide what happened. You, on the other hand, must respect the authority of the Court and accept the law as I charge it. You might disagree with the law. You might not like the law in its present state, but you must accept it.

This case involves three charges: two against Mr. McKibbin, one against Mr. DiGregorio, and you must judge each charge separately as if you were trying three cases. Judge each charge against the evidence and determine whether the Government has sustained its burden.

The defendants are presumed innocent. Each defendant begins the trial with a clean slate. Each defendant is concluded to be innocent at the start of the trial as to each charge against him, and that presumption, that conclusion, remains with the defendants throughout the trial and throughout your deliberations and prevails unless the Government has proved its case beyond a reasonable doubt.

Now, in Scotland there are three verdicts. You may have heard of the term, "Scotch verdict."

It is "Guilty," "Not guilty," or "Not proven." In this country we have two verdicts: "Guilty" or "Not guilty." "Not proven," is included in the verdict of "Not guilty." So that if the Government has failed to sustain its burden, has failed to prove its case beyond a reasonable doubt, you must acquit the defendants.

Now, I'll be using the singular and plural, but in the sense that I give it, if it applies to both, of course, then apply it to both. I'll try to remember that if it applies to one, to call your attention to that.

Reasonable doubt is a doubt which a reasonable person has after weighing all the evidence. It is a doubt based on reason and common sense as distinguished from an emotional doubt. It is a doubt based on experience as distinguished from a vague, speculative doubt. A reasonable doubt is the kind of doubt that will make a reasonable person hesitate in a matter of extreme importance to himself.

Proof beyond a reasonable doubt is proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your affairs.

The defendant doesn't have to prove his innocence. The defendant doesn't have to offer any proof. The defendant can rely on the failure of the Government to prove its case. The Government's burden is not to prove its case beyond all doubt. There is a modifying adjective, proof beyond a reasonable doubt. The Government isn't required to prove to you that every bit of evidence is true beyond a reasonable doubt. It is required to prove to you that all the essential elements of the crime charged are established beyond a reasonable doubt. I'll charge you on what the essential elements of the crimes charged are.

Now, in this case the defendants have offered character evidence. Both defendants have offered character evidence through Isaac Rimler, as I recall it. Where a defendant has offered evidence of good general character for truth and veracity or honesty, integrity or as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Evidence of a defendant's reputation for truth and veracity, honesty, integrity, or as a law-abiding citizen has not been discussed or that these traits have not been challenged may be sufficient to warrant an inference of good reputation

as to those traits of character. Evidence of a defendant's reputation inconsistent with those traits of character ordinarily involved in the commission of the crimes charged may give rise to a reasonable doubt, since the jury may think it improbable that a person of good character with respect to those traits would commit such a crime.

The jury will always bear in mind the defendant is not required to offer any proof in a criminal case and the burden is always on the Government, in assessing the weight of the good character evidence together with all the other evidence in the case. Of course, if on the whole case, including evidence of reputation of good character in the community, you find the Government has proven its case beyond a reasonable doubt, then the mere fact that a witness has testified that the defendant or defendants are men of good character should not stand in the way of a conviction. If the Government has proved its case beyond a reasonable doubt including evidence of good character, then you have an obligation to bring in a verdict consistent with that finding.

What is evidence? Evidence is generally classified in two groups. One, direct evidence, and

the other circumstantial evidence. Direct evidence is testimony by a witness of what that witness saw or heard while circumstantial evidence is a method of proving or disproving a disputed fact by drawing reasonable inferences based on experience and common sense from established facts.

I give a stock example that probably is more illuminating than the definition. I'll give it here. If my courtroom deputy, Mr. Adler, was standing on the street corner talking one night and I were facing the roadway and facing a stop sign and he had the back of the stop sign out of view, and as he was talking a motor vehicle came along and passed the stop sign without stopping, if I were called as a witness, facing the stop sign, I would testify I saw this 1975 white Cadillac driven by the defendant traveling at about 65 miles per hour proceed down the particular street while talking with Mr. Adler. I had the stop sign in view. He passed the stop sign without stopping, and then struck the plaintiff causing her the injuries she claims.

If Mr. Adler were called to testify he couldn't give direct testimony on that issue. In other words, he must first identify the issue. Did the defendant

pass the stop sign without stopping? But he was in the vicinity. He could testify as to facts from which a reasonable inference might be drawn that that motor vehicle passed the stop sign without stopping. He might say, "Well, while talking to the Judge that particular evening I caught the motor vehicle in my peripheral vision. Then it came into view. I saw it traveling at about 65 miles per hour and possibly barely through the corner of my right eye, since it was coming in that direction, and I lost sight of it for about one hundred fifty feet, and then I turned and saw two seconds later, it was traveling at the same speed, I saw it strike this plaintiff, knocking her down."

Now, I think under those circumstances you would infer that that motor vehicle passed the stop sign without stopping. You would infer that from Mr. Adler's testimony, because the circumstances are that the car was traveling at 65 miles per hour, was out of view, which means that it traveled 150 feet, and it traveled that 150 feet in two seconds, so that the inference, reasonable inference, based on experience and common sense would lead you to infer from the direct testimony, circumstantial evidence,

that that car passed the stop sign without stopping.

The law does not hold that one type of evidence is of better quality than the other. The law only requires that the Government prove beyond a reasonable doubt all the essential elements of the crime, both on the direct and the circumstantial evidence.

It's quite obvious when the Government must prove criminal intent, state of mind, what the defendant meant when he used certain statements, well, of course, that can only be proven by circumstantial evidence.

What is evidence in the case? Evidence is the sworn testimony of witnesses regardless of who may have called them, also the exhibits received in evidence, regardless of who may have produced them, the facts which have been admitted or stipulated.

I think it's important for you to know what is not evidence. Statements made by counsel in opening, in summation, or maybe some random remarks made, that is not evidence. The opening, as I pointed out, serves a very useful purpose, as does the summation, the opening to alert the jury as to what is to follow,

so the jury may more easily follow it, the summation to argue the case, to focus attention on what each side regards as important evidence in his case, to offer to the jury theories by the defendant of exculpability, which means a finding of not guilty, the theories of inculpability on behalf of the Government, which means a finding of guilt.

You may find a theory or an argument attractive and of course if it agrees with what you're thinking, it's just intended to stimulate your thoughts, you may accept it. If you find it illogical or for other reasons you decide that it doesn't make sense, then reject it, but they're helpful to a jury in the search for the truth.

Statements of the Court are not evidence. Questions by the Court should not be given any special significance. If I asked a question it was only because in my own mind there was some cloudy or fuzzy areas and I thought that if I found it difficult to understand a particular event or subject that maybe the jury felt the same way. I could have been wrong. You may have caught it. I may have missed it. But I asked it only because I thought it might help the jury, not because of any citing

of the case at all.

Statements stricken from the record are not evidence. If it is stricken from the record, the Court instructs you to disregard it or even if I didn't instruct you to disregard it, disregard it. It should be expunged from your minds and from your consideration.

Questions to which objection has been sustained, of course, are not in the record and you may not speculate on what the answers may have been if the Court allowed the witness to answer. The point is the Court found that as a matter of law the questions were objectionable. They were improper and you can't just wonder what the witness would have said. It's not in the record. You have a duty to decide this case solely on what is in the record and nothing else except your good common sense and your experience.

I have used the terms "inference" and "presumption." I said a presumption is a conclusion which the law requires the jury to make and prevails unless overcome by proof beyond a reasonable doubt to the contrary, and the example of that, of course, is a presumption of innocence. An inference is a

conclusion which the jury may make based on experience, reason and good common sense, and the example of that, of course, is the inference which the jury may make from established facts in determining a disputed fact through circumstantial evidence.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony of each witness who appeared before you and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, consider the motive of the witness in testifying, the witness's state of mind, why the witness is testifying, the demeanor and manner while on the witness stand. Did the witness answer forthrightly? Directly? The witness's own ability to observe the matters as to which he has testified, whether he impressed you as having an accurate recollection of those matters, the relationship each witness might bear to either side of the case. In other words, the FBI agents, having worked on the case, may have an interest in seeing that the case is brought to what they deem a successful conclusion.

The defendants, on the other hand, have an obvious interest in the outcome of the case. Test the credibility of the testimony by all these guides: in other words, the manner in which each witness may be affected by the verdict, the extent to which, if at all, the witness is corroborated or contradicted by his own or other testimony in the case.

You have heard a Latin phrase repeated by everyone. I never use the Latin. I'll do it just because it was. "Falsus in uno, falsus in omnibus." It means if a witness is shown to have knowingly testified falsely concerning a material fact, you have the right to distrust all such witness's testimony or you may decide to accept as much of it as you think is credible. In other words, if a witness has lied before you under oath as to a material fact, you may say, "I'll believe none of that witness's testimony, but that is not an order, to disregard all that witness's testimony. It leaves it solely within your discretion. You may decide to accept other portions of the testimony that for reasons that you best understand you take and you accept and credit.

Testimony was offered by both sides, the

Government and the defendants, which in effect said that at a time prior to testifying, you, the witness, in one case Mr. Karapetyn, as I understand, in the other case Mr. McKibbin and Mr. DiGregorio, said something that was inconsistent with what you said under oath before the jury. Evidence that at some other time the witness has said something which is inconsistent with the witness's testimony at the trial may be considered by the jury for the purpose of judging the credibility of the witness.

Part of the claim made by the defendants is that what Mr. Karapetyn told -- or failed to tell the FBI officers was inconsistent with his testimony. They, in effect, say, "At the time you told it to the FBI officers, gave them your version of what occurred, it was naturally expected that you would tell them first that you were beaten up at Jack's locksmith's store and you would have told them at the time that Mr. DiGregorio got out of the car and stood in a certain position on the street or sidewalk, that you would have said that Mr. DiGregorio was behind you." It is for you, the jury, to decide, first, whether the statements previously made or the failure to make the statements was inconsistent with

the testimony on the statements that were previously made, taking into account all the circumstances in which the statements were made.

On the question of those statements which the defendants say should have been given to the FBI agents, you determine whether under all the circumstances it was natural, normal, or expected under those circumstances to have supplied that information to the FBI. If you find that the statement or the omission was inconsistent with the witness's testimony as given before you, then decide whether it was inconsistent as to a material fact, and then decide how it affects the credibility of the witness.

We recognize, and it is just plain common sense, that when anyone relates or narrates an event, an occurrence, in the retelling there are some normal variations. As a matter of fact, at times you might find that the normal variations lend truth to what the witness says because if a witness said again and again word for word on each previous occasion, pause for pause, gesture for gesture, you'd have a feeling that it was somehow rehearsed, so you, the jury, will understand those things. You will tell the difference between normal variations,

what should have been said, what shouldn't have been said in the normal course of things, whether it's inconsistent, whether it's not inconsistent. If inconsistent with the testimony given, then whether as to a material fact, then what weight to give that witness's credibility.

Now, the Government offered proof that on a previous occasion when interviewed by the FBI, both defendants at different times, Mr. DiGregorio on one occasion and Mr. McKibbin on the other, made statements which tended to exculpate the defendants, tended to be proof of their innocence. I don't recall all that was said. If I recall, in the one case the Government says -- and I think the defendant McKibbin admitted on the stand that he told the FBI agents that he loaned Mr. Karapetyn $900 and it was for a car.

Well, first you decide whether that's an exculpatory statement, because the Government says that first it wasn't all for a car. $100 of it was for rent. The Government says something like $350 was for a car. Even on the defendant's statement that $450 was for insurance and other matters, plates and so forth, you decide whether, loosely told, as a

layman would tell it, whether that was for a car or not. But that isn't the important thing. First you decide whether Mr. McKibbin said that, and if he said other things, whether the other things he said to the FBI agents were intended to say to the FBI agents in effect, "I'm not guilty of trying to collect money through extortionate means."

And turning to Mr. DiGregorio, when he said that he wasn't present at certain times when there was a discussion with Mr. McKibbin and Mr. Karapetyn, whether that was exculpatory.

Statements knowingly made by a defendant upon being informed that a crime has been committed or upon being confronted with a criminal charge may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence. When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt.

Ordinarily it is reasonable to infer that innocent persons do not usually find it necessary to

invent or fabricate an explanation or statement tending to establish innocence. Whether or not the evidence as to the defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence, the matter is exclusively within the province of the jury.

But before you even consider exculpatory statements, you must be satisfied by proof beyond a reasonable doubt that the statements were knowingly and voluntarily and intentionally made. You heard the defense argue that the defendant was nervous at the time and that the statements were coerced. The Government must prove beyond a reasonable doubt that the defendant who is to be charged with such statements was warned that he had a right to remain silent, that if he made any statements they could be used against him, that he had a right to counsel, that the Government would supply counsel without cost to him. Unless you find all that proved beyond a reasonable doubt, disregard all the exculpatory statements offered by the Government.

Let's turn to the charge in the indictment. Count 1 charges that on or about and between May 1,

1972, and August 9, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Frank J. McKibbin and the defendant Robert L. DiGregorio, knowingly used extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to attempt to collect and to collect from Aram Karapetyn, a debtor, an extension of credit, to wit, the defendant Frank J. McKibbin and the defendant Robert L. DiGregorio expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person of the said debtor.

Count 2. "That on or about and between May 1, 1972, and November 1, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendant Frank J. McKibbin, knowingly used extortionate means within the meaning of Section 891(7) of Title 18, United States Code, to attempt to collect and to collect from Carl Gross, a debtor, an extension of credit, to wit; the defendant Frank J. McKibbin expressly and implicitly threatened the use of violence and other criminal means to cause harm to the person of the said debtor."

Now, the phrase "extension of credit" may be a little confusing to you. You know it as a loan, a debt. But the statute uses the term "extension of credit." In effect, what Count 1 charges is that Frank J. McKibbin and Robert L. DiGregorio knowingly used threats of violence, threats to inflict physical harm on Aram Karapetyn in order to collect money that Frank McKibbin claimed was due him.

Count 2, again, is a charge only against the defendant Frank J. McKibbin, and here the charge, based on the same statute and framed in the same language, says that Frank J. McKibbin knowingly used threats of violence as a means to collect money from Carl Gross.

What is and what is not criminal conduct as defined by the Congress? To say it in the affirmative language, Congress says what is a crime. So the Congress, under 18 -- incidentally, most of the federal law is codified. We find it under Title 18, "Crimes and Criminal Procedure." Other titles are Bankruptcy, Transportation, and Administrative Procedure, but that's what it means when we say "Title 18." The section refers to the particular section of that title. This indictment is based

on 18 United States Code, Section 894. You'll find a lot of phraseology in the indictment borrowed from the statute. The statute says, "Collection of extensions of credit by extortionate means. Whoever knowingly participates in any way in the use of any extortionate means to collect or attempt to collect any extension of credit or to punish any person for the nonrepayment thereof" is guilty of a crime under that section.

Now, the previous section defines some of the terms used in 894. First, it says "To extend credit means to make...any loan...whether acknowledged or disputed, valid or invalid, and however arising..." so that extension of credit when the term is used you think of in this case the loan that Mr. Karapetyn said he received and Mr. McKibbin said he gave and it doesn't matter as the statute says, whether it's valid or invalid and however arising.

Again, in Count 2, the loan that Mr. Gross says he received and the loan that Mr. McKibbin says he gave to Mr. Gross, whether valid or invalid, and it doesn't matter that there's a dispute about the amount, it doesn't matter that the loan was without interest or at a usurious interest. The section

does not make it a crime to charge usurious interest, no matter how much the interest rate is. It doesn't matter that the loan was not repaid. What the Congress has in effect said is that there are lawful means of collecting debts and no one may use threats of violence or other criminal means to enforce the collection of a debt.

There are three essential elements of the crime charged. That's true of both counts and the Government must prove all these three elements beyond a reasonable doubt.

One, that the loan was made.

Two, that the accused knowingly made threats of physical harm to the debtor. Now, in Count 1, that the threats of physical harm were made to Mr. Karapetyn;he is the debtor named therein. In Count 2, that threats of physical harm were made to Carl Gross, who is the debtor named there.

Three, that such threats were made either to collect or attempt to collect the loan or (b) to punish the debtor for nonrepayment of the loan, for failure or refusal to pay the loan.

By definition in the statute itself, "threats of bodily harm, whether they are expressed or implicit,"

that means implied from all the circumstances, is an extortionate means and a violation of the statute. The threat of bodily harm as defined by the statute must be knowingly made, knowingly made by the accused. The Government must prove beyond a reasonable doubt that it was made with the intent of instilling the fear of bodily harm in the debtor for the purpose of collecting the debt. The fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the debtor. It must be the emotional reaction of a reasonable debtor to the knowing threats made by the accused.

In every criminal case there are two main elements of the crime. First, criminal intent, and then the proscribed conduct, the conduct which the Congress says you may not do. But if, for example, somebody was driving along the street and gave me a package, said, "Do me a favor, deliver this to Mr.X," and I said, "Sure," and I delivered it and later learned that it was an unlicensed firearm, that wouldn't be a crime, even though the statute says you may not knowingly possess an unlicensed firearm. You see,one is a proscribed conduct. The Congress says,

"Do not carry a firearm, unlicensed firearm." That's only one part of the crime. The other element, criminal intent. Knowingly. The party accused must be aware and so here the accused must be aware that what he is saying and what he is doing is intended to convey to the debtor a threat of physical violence understanding that that threat will produce the payment. If it were just jokingly said, if it weren't for that purpose, then the Government hasn't proved it's for the purpose provided by the statute. Then the Government shall have failed to prove criminal intent. In that event, you must acquit the defendant.

On the other hand, if the Government shall have proved beyond a reasonable doubt as I have defined it in Count No. 1, that a loan was made to Mr. Karapetyn, that the defendant Frank J. McKibbin knowingly made threats of physical harm to Mr. Karapetyn and that such threats were made to collect or attempt to collect the loan or to punish the debtor for nonpayment, then the Government shall have proved its case against Mr. McKibbin, and you have an obligation to bring back a verdict of guilty on that count.

The same is true as to Mr. McKibbin as to

Count 2.

I wanted to charge you on aiding and abetting and I don't have the statute before me. If either counsel has Section 2 of Title 18, I'd appreciate it.

MR. RITCHIE: No, your Honor.

THE COURT: I'll have to excuse the jury for two minutes because I want to bring the statute to you. In shuffling all these papers, I neglected to do that.

Don't discuss the case. It will take me a minute to get the volume.

(The jury leaves the courtroom.)

THE COURT: It will just take me two minutes.

(Recess)

(The jury entered the jury box.)

THE COURT: In a case where two or more persons are charged with the commission of a crime, the guilt of any defendant may be established without proof that he personally did every act constituting the offense.

Section 2 of Title 18 says as follows: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." In other words, every person who willfully participates in the commission of a crime may be found guilty of that offense. Participation is willful if done voluntarily and intentionally and with the specific intent to do something the law forbids. Mere presence at the scene of a crime without any more is not evidence of a crime; even if the party present knew that a crime was being committed and he did nothing about it, he is not guilty of a crime.

To find someone guilty of aiding and abetting another to commit a crime, it must be shown that that person did something to help the success of the crime, knowingly and willfully participated in it.

You will soon be given this case for your consideration, and during your deliberations you may have questions to ask of the Court. All the questions will be funneled through your foreman. You will be given pencil and paper. If you want to hear testimony, then I'll ask the reporter to read the testimony back. It takes time find the testimony, so if you write me a note it may take ten or fifteen minutes, but it will

be given to you if you want it. If you want any of the exhibits, you will have them for the asking. You can ask for specific exhibits or ask for all the exhibits.

Each one of you must decide the case for himself and herself. Each one of you has the obligation of going over the testimony, of discussing the testimony with your fellow jurors. It's improper for any juror to either take an intransigent position where you say, "This is my verdict, and I will not be moved. There's no sense talking to me about it." That obviously is wrong. It's just as wrong for a juror to say to the others, "Well, I'll go along with anything you say."

However, the jury does have an obligation to discuss the evidence and attempt to arrive at a unanimous verdict. Each one must base his discussion, of course, on the evidence.

Now, when you arrive at a unanimous verdict, then send a note to me through the marshal, who will be assigned. All you need say is, "We have reached a verdict." Don't tell me what the verdict is.

During your deliberations, don't tell me how you stand at any particular time. The jury

deliberations are secretive. It is not proper for you to say "six to six," "ten to two," or "eleven to one." When you have arrived at a unanimous verdict -- and that's what a verdict means to me -- just say, "We have arrived at a verdict."

When you shall have arrived at a verdict, I'll call you into the courtroom, after I receive your note. I'll ask the foreman to stand and in effect I'll say to you, "In the United States versus Frank J. McKibbin and Robert L. DiGregorio, as to Count 1, how do you find the defendant Frank J. McKibbon?" The foreman will give the verdict of the jury, guilty or not guilty. "As to Robert L. DiGregorio, how do you find the defendant Robert L. DiGregorio, guilty or not guilty?" You will render the verdict as to him. Then I'll go to Count 2, and again I'll say, "As to Count 2, how do you find the defendant Frank J. McKibbin, guilty or not guilty?" The foreman will render the verdict. That's the first time, in open court, that it becomes a verdict of this jury, but then I'll poll the jury. I'll go to Juror No. 2 and in effect I'll ask, "Did you hear the foreman render the verdict? Is that your verdict," and then Juror No. 3, four, five,

and so on until Juror No. 12.

At this point I ask you to take leave of the court. Don't start your deliberations yet. I want to talk to counsel.

(The jury leaves the courtroom.)

THE COURT: Mr. Ritchie, any exceptions?

MR. RITCHIE: No, your Honor.

MR. PORT: I have no objection except we discussed yesterday one additional consideration which was not charged, at least I didn't hear it charged as such. That was the situation where the jury could take into account the circumstances during the periods when Mr. Karapetyn was under the direction of the Federal Bureau of Investigation, the conversations that take place thereunder and some of the responses there might not be deemed to be the usual give and take between the parties prior to that situation.

THE COURT: You asked me to charge that and I said argue that before the jury, and that's part of the criminal intent rather than entrapment. I charged on criminal intent.

MR. PORT: I only mention the point I felt there might be some consideration as to the fact

they might give consideration that at that time the two parties were not in the usual status in the sense they would be prior to his being wired and prior to his being in the protective custody and under the direction of the FBI because I indicated, I said some of the things I said might have occurred could have been a direct response of the dilatory statements he was told to give by the FBI in the presentation of the preparation of that case.

THE COURT: No, I asked them to take into consideration all the circumstances under which any statement is made. I decline to so charge. I made no such promise.

MR. PORT: It was discussed; it wasn't a promise.

THE COURT: What I intended to say was, "Argue that to the jury." If I say that to the jury now it in effect would be a second summation to the defendant.

MR. KELLY: I have no objections.

THE COURT: Please seat the jury.

(The jury enters the jury box.)

THE COURT: Alternate No. 1, you're excused with the thanks of the Court. Only twelve jurors

may deliberate on the matter. If you have your coat inside, please remove it.

(Alternate Juror No. 1 is excused.)

THE COURT: I think that completes your service. Check downstairs anyway.

ALTERNATE NO. 1: Fine, thank you.

THE COURT: Will the Clerk please swear in the marshal.

(The marshal was duly sworn.)

(James Campion is duly sworn.)

THE COURT: The jury is excused for deliberation on the matter before them. I just recall to you the oath you took before this trial started and before you entered. That was to render a true and just verdict. That in turn means to render a verdict based on the evidence in accordance with the charge that the Court has given you, and free of all bias, prejudice and sympathy, and if you do that, as I am sure you will, neither side can complain. The jury is excused.

(The jury leaves the courtroom.)

THE COURT: I'm about to start a non-jury trial. I think that if you put your papers, Mr.Port and Mr. Kelly, at the end of the table, there actually

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

-against-

FRANK J. Mc KIBBIN and
ROBERT L. DI GREGORIO,

Defendants.

73 CR 523

Memorandum of Decision
and Order

February 6, 1974

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On November 15, 1973, the jury found the defendants guilty of count 1 in the indictment charging them with using extortionate means to collect an outstanding debt owed by one Arim Carapetyan, in violation of 18 U.S.C. § 894.[1] Defendants now move for a new trial on the ground of newly discovered evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure.[2] For the reasons

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[1] The jury found the defendant Frank J. Mc Kibbin not guilty of using extortionate means to collect an extension of credit from one Carl Gross. Defendant Di Gregorio was not charged with this offense.

[2] F.R. Crim. P. 33 states in part that:
The court on motion of the defendant may grant a new trial to him if required in the interest of justice.

discussed below, the motion is denied.

At the trial, Carapetyan testified that in July, 1971, he borrowed $100 from the defendant Mc Kibbin. Carapetyan began repaying the loan at the rate of $5.00 a week, but was subsequently advised by Mc Kibbin that the payment was interest, that, since Carapetyan had been in default for a few weeks, the indebtedness had risen to $150, and that the weekly installments had risen to $10.00. Carapetyan testified that he made ten additional payments of $10.00 each, but that he stopped paying for a few weeks. In March 1972, Carapetyan was at a car service station (Kings Bay Car Service), where he was employed part time, when Mc Kibbin approached him and invited him outside. The two went into a locksmith store near the car service, owned by an individual identified only as "Jack", and known only as "Jack's Locksmith Shop." Mc Kibbin advised Carapetyan that the indebtedness was now $450 and that weekly installment payments were $20.00. When Carapetyan protested and indicated that he would make no further payments, Mc Kibbin punched him in the stomach and in the nose causing bleeding from the nose, with an admonition that more serious consequences would flow from any further failure to pay. Carapetyan testified on cross-examination

that Jack witnessed the assault.

The newly-discovered evidence on which defendants' motion for a new trial is based is testimony by one Jack Levine, the owner of a locksmith shop at or near Kings Bay Car Service, that he never saw Mc Kibbin threaten or strike Carapetyan.[3] Counsel for defendant Mc Kibbin, Leon R. Port, states in his affidavit that Carapetyan "knowingly and intentionally" fabricated the story of the alleged beating "virtually on the eve of the trial "[4] and deliberately

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[3] Jack Levine states in his affidavit that "I have seen Mr. Mc Kibbin and Mr. Carpetyan [sic] on some occasions but I never seen the incident described . . . ." (Affidavit of Jack Levine at 1).

[4] Mr. Port's affidavit states as follows:

> The deponent herein wishes to make it absolutely and positively clear that the misleading assertion concerning the alleged assault, if it ever occurred, was in no way due to the knowing acts of the FBI or the U.S. Attorney. The allegation here is that the story of the alleged beating, which is apparently untrue, was knowingly and intentionally a deliberate act of the complainant, Aram Carapetyan, which was added to his complaint and subsequent to almost all of his interviews with the U.S. Attorney.

The affidavit seems to charge the U.S. Attorney with an impropriety in failing to disclose the evidence in response to the defendant's demand for statements as contained in Mr. Port's letter of August 31, 1973. A reading of the letter indicates that the demand was for statements of the defendant Mc Kibbin. The U.S. Attorney complied with the demand by supplying a copy of Mr. Carapetyan's statement dated July 19, 1972.

concealed the full name and telephone number of Jack Levine. Port's affidavit further states that:

> There was no way during the trial that Jack Levine could be located, althought [sic] attempts were made to do so, since the store which he had formerly operated was closed for approximately one year. Mr. Mc Kibbin, unlike Mr. Carapetyan, did not have Jack's last name or address or phone number; only by circulating among all the car services did he finally find a mutual friend, a Mr. Gross, somewhere on Avenue U in Brooklyn, who was found only after a store by store search, pursuant to my request, which search could not properly be completed until after the trial was over.

(Affidavit of Leon R. Port at 6-7.)

The court conducted a hearing on January 18, 1974 at which Jack Levine testified. He stated that he was the Jack who owned and operated a locksmith shop next door to the car service in March, 1972; that he did not witness an assault in March, 1972 in his store, nor did he ever witness an assault inflicted by Mr. Mc Kibbin on anyone, at anytime, or any place; that he did not ask Mr. Carapetyan to conceal his presence at the alleged assault, nor did he ask Mr. Carapetyan not to involve him in any way. This testimony contradicts Carapetyan's testimony at the trial.

A motion for a new trial is addressed to the sound discretion of the trial judge. United States v.

Costello, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937, 78 S.Ct. 1385 (1958); United States v. Johnson, 208 F.2d 404, 405 (2d Cir. 1953), cert. denied, 347 U.S. 928, 74 S.Ct. 531 (1954). In exercising that discretion, the court may use the knowledge acquired in the conduct of the trial. United States v. On Lee, 201 F.2d 722, 723 (2d Cir.), cert. denied, 345 U.S. 936, 73 S.Ct. 798 (1953).

A jury's determination of a defendant's guilt is not to be lightly brushed aside. See United States v. Johnson, 327 U.S. 106, 111, 66 S.Ct. 464, 466 (1946); United States v. Costello, 255 F.2d at 879. The burden is on the defendants to show that the interests of justice require a new trial. United States v. Soblen, 203 F.Supp. 542, 564 (S.D.N.Y. 1961), aff'd, 301 F.2d 236 (2d Cir. 1962), cert. denied, 370 U.S. 944, 82 S.Ct. 1585.

In United States v. Kahn, 472 F.2d 272, 287 (2d Cir. 1973), the Second Circuit set forth the following three tests to be applied in determining whether to grant a new trial:

(1) the evidence "must be material to the factual issues at the trial and not merely cumulative and impeaching;"

(2) it "must have been discovered after trial;" and

(3) it must be "of such a character that it would probably produce a different verdict in the event of a

retrial."[5]

The defendants have satisfied the first test. The testimony of Jack Levine is not solely impeaching evidence. Rather, it is evidence bearing directly on the vital issue in the case -- whether the defendants employed extortionate means. The two remaining tests, however, have not been met.

Defendants claim that, since they did not learn of the identity of Jack Levine until after the trial, the evidence was "discovered after trial." The defendants, however,

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[5] The court in Kahn qualified its statement of the general rule as follows:

> However, the strict standards of the general rule are relaxed where the newly discovered evidence was known to the government at the time of trial, but not disclosed. If it can be shown that the government deliberately suppressed the evidence, a new trial is warranted if the evidence is merely material or favorable to the defense. . . . The same rule applies, even in the absence of intentional suppression, if it appears that the high value of the undisclosed evidence could not have escaped the prosecutor's attention. . . . In each of these instances, the materiality of the evidence to the defendant is measured by the effect of its suppression upon preparation for trial, rather than its predicted effect on the jury's verdict.

472 F.2d at 287 (citations omitted). In the instant case, however, the Government cannot be charged with suppression of evidence. The Government learned sometime between October 30, 1972 and November 2, 1972 that Carapetyan was ready to testify concerning the incident in Jack's Locksmith Shop. Carapetyan advised Assistant U.S. Attorney Ritchie that he had not revealed the

were advised of the Government's intention of offering Carapetyan's testimony in the Government's opening statement.[16] On cross-examination by Di Gregorio's counsel, Carapetyan revealed the existence of the potential witness, his first name, and his place of employment at the time of the incident.[17] No demand for the identification or production

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[15] continued:

incident and that he had concealed Jack's identity because he did not want to involve Jack and because Jack asked him not to mention the incident. Assuming the testimony of Carapetyan concerning his motive for concealing the incident to be true, it amounts to nothing more than poor judgment on the part of the Government witness.

[16] Assistant U.S. Attorney Ritchie stated that:

"Mr. Carapetyan will testify [that Mc Kibbin] took him into a key store next to the place where they made the loan and he hit Arim Carapetyan and told him, "I can't enforce my debt in a court of law but I can get it some other way and I will the next time that you don't continue paying."

(Tr. 9)

[17] The cross-examination by Mr. Kelly:

Q Anybody else in the store at that time, other than the two of you?

A Jack, the man who owns the store.

Q Did Jack see what happened, or are you aware that Jack was present at that time, when that blow or those blows took place?

A Yes.

Q Jack was there?

A Definitely.

(Tr. 78)

Mr. Carapetyan had previously identified another victim of an assault by Mr. Mc Kibbin named "Marty." The court directed the Government to identify Marty. Thereupon the Government turned over a statement identifying the individual as Meyer Katcher, 2300 Ocean Avenue, Apt. 4D, Brooklyn,

of the witness was made. Defendants avoided asking the obvious questions that would have identified Jack Levine. Although the court made it clear to Mc Kibbin's counsel that it would grant a continuance to the defendant if the defendant required it for the purpose of producing witnesses,[8] the defendant made no such request. It was not until two days after the verdict that the defendant made an effort to locate the witness.

In Wheeler v. United States, 382 F.2d 998, 1002 (10 Cir. 1967) the court stated that "[i]t is too well settled for discussion that a new trial is not warranted by evidence which with reasonable diligence, could have been discovered and produced at the trial." (citations omitted). Accord, United States v. Jacobs, 431 F.2d 754, 763 (2d Cir. 1970), cert. denied, 402 U.S. 950, 91 S.Ct. 1613; United States v. Edwards, 366 F.2d 853, 873, cert. denied, 386 U.S. 908, 87 S.Ct. 852; United States v. Bujese,

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/7 continued:

New York, telephone number 336-9438. Mr. Ritchie then advised the court and counsel that he did not intend to call Mr. Katcher. The defendants failed to call Mr. Katcher. (Tr. 50)

/8 When the court was advised by counsel that defendant, Mc Kibbin had difficulty securing the presence of certain witnesses to testify on another issue in the case, the court offered Mc Kibbin a continuance. (Tr. 454A-456A).

371 F.2d 120, 125 (3d Cir. 1961); United States v. Soblen, 203 F.Supp. 542, 565, aff'd, 301 F.2d 236 (2d Cir. 1962), cert. denied, 370 U.S. 944, 82 S.Ct. 1585. The defendants have failed to show that they exercised due diligence in attempting to locate Jack Levine and obtain his testimony.

In determining whether the testimony of Jack Levine would produce an acquittal in the event of a new trial, the court must evaluate the strength of the Government's case. Although the testimony of Carapetyan was vital to the Government's case, his testimony was not without support. The recorded conversations of August 4, 1972 and August 8, 1972 corroborate Carapetyan's testimony that Mc Kibbin increased the indebtedness as a penalty for failing or refusing to pay exorbitant interest rates and the weekly installments. The following part of the August 4 conversation is an example of this corroborating evidence:

FM All right, Tuesday. /9
AC Tuesday, very good. OK * just thought I'd come in and at least see you...

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/9 "FM" is Frank J. McKibbin
"AC" is Arim Carapetyan
"RD" and "BOB" is Robert L. Di Gregorio

FM Aram...
AC ...That's the important thing...
FM Aram...if you go past Wednesday, run away. That's all I can tell you. Run away...
AC Take off...go...
FM Right.
AC ...don't come back...huh...is that what you say, BOB?
BOB I would suggest it, yes.
AC You suggest it...
FM I would suggest it, really. If you don't come Wednesday...
AC ...by Wednesday
FM ...I might do something the (wrong way?)...
AC I'm finished. Listen, I...I...uh...no, they should have it by then.
FM If there wasn't somebody I hate more than you right now...
AC Uh-huh...
FM I'd [obscenity]kill you. All right. (inaudible) Somebody else I want to save all my [obscenity] frustrations for him.
AC ...to do it to him...OK, so, listen, I hope that everything will work out by Tuesday.
FM Yeah, I hope so.

Again on August 8, 1972, the conversation corroborated Carapetyan's testimony that Mc Kibbin was demanding $25 (or $20 a week), that the indebtedness was increased to $900, and that the defendants made it clear that failure to pay would result in serious harm to Carapetyan:

RD He[Mc Kibbin] should be here at 3 o'clock.
AC About 3 o'clock.
RD Just don't go anywhere.
AC No, er, uh, you'll be back?
RD I'll be-go park my car.
AC Oh, alright, I'll be here, uh, I'd rather speak to him, you know-because, uh, I have to-I-I'll wait for you anyway. Alright? Really, everything is down. The only thing is-got to take care of that damn policy then

I will pay. Right?

RD (inaudible)

AC Let's not go in the car service, I don't want people-

RD We're not going in the car service-

AC No, I mean, you know (inaudible) I don't want people to know my business there, you know? (inaudible)

RD (inaudible) by the car. Just don't go anywhere.

AC Well, I'll be here. (Inaudible) in the shade. I'll be here. Okay?

RD (Inaudible)

AC Alright-OK

(recorder off)

(recorder on) (Beginning of MC KIBBIN conversation)

AC Anyhow, I got-

FM So Where's the car?

AC The car's in the garage. Because-you know (inaudible) I might as well keep it there for awhile. So how's everything?

FM Alright.

AC Alright?

AC You remember the check I told you was suppose to clear?

FM Yeah

* * *

FM (inaudible) you have the money. That don't tell me nothing, ARAM.

AC MMM

FM You're supposed to pay 25 a week, you ain't-

AC Correct

FM Paid a [obscenity] quarter on it?

AC Yeah, the only thing is. I, you know, my is, uh, you know the insurance expired. I had to turn the plates in because I can't drive for 30 days according to New York State law, you can't drive the car. So I'm not even driving.

FM Where's the car now?

AC It's in a garage.

FM In what garage

AC It's on, uh, uh, uh-what's it called? Uh, uh its in the Mobil gas station (inaudible) Uh, its on Brighton Beach. There's a garage there. I put the car there for 30 days until-you-know-I can get the insurance and-you know-when you work

FM Yeah

AC I will have a little money. I can pay you. But meantime, I asked my dad to cash that insurance. Now-I don't know-it might take-it has to take a few days. I know that because they send me the money so I can give it to you. Now, now, you said it was what 900 dollars, right?

FM Yeah

AC So I owe you 900 dollars-might as well give you the whole thing.

FM How do I know your gonna give me 900 dollars out of-

Furthermore, Special Agent Merrill Parks testified concerning inculpatory and exculpatory statements (Tr. 188A, 190A) made by Mc Kibbin which were inconsistent with Mc Kibbin's testimony at the trial and which supported the verdict.

The testimony of Jack Levine could have been discovered with reasonable diligence during the trial, and could have been produced at the trial. Though not solely impeaching testimony, it is not of sufficient weight as would have produced a different result. The motion is in all respects denied and it is

SO ORDERED.

Jacob Mishler

U. S. D. J.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

No. 73-CR-523

- against -

FRANK J. McKIBBON and
ROBERT L. DI GREGORIO,

Memorandum of Decision and Order

Defendants.

- - - - - - - - - - - - - - - - - - - -x

October 17,1973

Defendant McKibbon moves for a psychiatric examination of two Government complainant-witnesses who defendant claims are mentally incompetent.[/1] The application is supported by affidavits of three individuals who say they observed bizarre behavior of witness Aram Carpapetyan. The other Government witness is not identified. The Government's answering affidavit offers evidence of Carpapetyan's complete rationality and emotional stability.

The court has no inherent power to direct a psychiatric examination of a witness. United States v. Dildy, 39 F.R.D. 340 (D.D.C. 1966). The Advisory Committee's note to Rule 6-01[/2] of the Proposed Rules of Evidence states:

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/1 The motion seeks "to determine the mental stability" of "both" witnesses.

/2 Rule 6-01, General Rule of Competency, provides: "Every person is competent to be a witness except as otherwise provided in these rules."

(8)

"No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, 34 Geo. Wash. L. Rev. 53 (1965). Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509."

The motion is in all respects denied and it is

SO ORDERED.

U. S. D. J.